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12 *Jazwares, LLC; Kelly Amusement Holdings, LLC;*
13 *and Jazplus, LLC.*

14 KELLY TOYS HOLDINGS, LLC;
15 JAZWARES, LLC; KELLY
16 AMUSEMENT HOLDINGS, LLC;
17 and JAZPLUS, LLC,

18 Plaintiffs,

19 vs.

20 BUILD-A-BEAR WORKSHOP, INC.,

21 Defendant.

22 Case No. 2:24-cv-01169-JLS-MAR

23 **AMENDED COMPLAINT FOR:**

- 24 1. **Trade Dress Infringement Under**
the Lanham Act;
2. **Common Law Trade Dress**
Infringement;
3. **Copyright Infringement Under**
the Copyright Act;
4. **Common Law Unfair**
Competition; and
5. **California Statutory Unfair**
Competition.

25 **DEMAND FOR JURY TRIAL**

1 Plaintiffs KELLY TOYS HOLDINGS, LLC, JAZWARES, LLC, KELLY
 2 AMUSEMENT HOLDINGS, LLC, and JAZPLUS, LLC (collectively, “Kelly Toys”)
 3 bring this action against Defendant BUILD-A-BEAR WORKSHOP, INC. (“Build-A-
 4 Bear”) for injunctive relief and damages under the laws of the United States and the
 5 State of California, as follows:

6 **INTRODUCTION**

7 1. Plaintiffs are among the world’s leading manufacturers and distributors
 8 of high-quality plush toys and other consumer products. In 2016, their distinctive line
 9 of plush toys branded “Squishmallows” was released. Often referred to as just
 10 “Squish,” these soft, huggable friends immediately appealed to adults and children
 11 alike. Consumers throughout the United States began collecting Squishmallows and
 12 even started online communities to track the availability of new Squishmallows as they
 13 were released. Celebrities like Lady Gaga and Kim Kardashian have posted their
 14 collections of Squishmallows on social media. And major American publications,
 15 including *The New York Times*, have profiled the broad popularity of the



Squishmallows products worldwide. As one consumer remarked about her Squishmallows plush: "It just brings me happiness and that warm and fuzzy feeling."¹

2. Squishmallows have become a phenomenon, rapidly experiencing breakaway success and quickly turning into a coveted collectors' item with an avid fanbase. Indeed, in 2023 Squishmallows was the top-selling toy in the country.²

3. Rather than competing fairly in the marketplace by creating its own unique concepts and product lines, Defendant Build-A-Bear, a company worth over 300 million dollars, decided that it would be easier to simply copy, imitate, and profit off the popularity and goodwill of Squishmallows, all in the hopes of confusing consumers into buying its products instead of Squishmallows.

4. In January 2024, Build-A-Bear announced the release of its “Skoosherz” plush toys. As seen below, the Skoosherz toys have the *same* distinctive trade dress as the popular Squishmallows. And, likely noticing that consumers refer to Squishmallows as Squish, Build-A-Bear named its line “Skoosherz” to evoke an association with the word “Squish.” If a picture is worth a thousand words, the side by side comparison of Squishmallows against the Skoosherz copycats speaks volumes:

Squishmallows Original Product



Skoosherz Copycat Product



¹ Taylor Lorenz, *Squishmallows Are Taking Over*, N.Y. Times (March 16, 2021), <https://www.nytimes.com/2021/03/16/style/squishmallows.html>.

² Circana Announces Its Annual Global Toy Industry Performance Award Winners, Circana (Jan. 31, 2024), <https://www.circana.com/intelligence/press-releases/2024/circana-announces-its-annual-global-toy-industry-performance-award-winners/>.

Squishmallows Original Product



Skoosherz Copycat Product



5. Upon information and belief, in the marketplace, Build-A-Bear has been trying to trick customers looking for Squishmallows into buying its own Skoosherz instead. Indeed, the similarities have not gone unnoticed—immediately upon their launch, multiple media outlets have already referred to Skoosherz as “Squishmallow-like” and “Squishmallow-adjacent.”³ Consumers have likewise taken no time to identify Build-A-Bear’s attempt to replicate the Squishmallows Trade Dress, commenting that Skoosherz are “like a worse Squishmallow” and that Build-A-Bear is “just trying to copy Squishmallow[s]” and is “ripping off Kellytoys.” Others have noted that Skoosherz “look like cheap squishmallow knockoffs,” noting that “they literally used the most popular squishmallow animals/designs.”

6. Build-A-Bear's efforts have created substantial and actual confusion even in the short time that they've been available. For example, a confused consumer asked on the Build-A-Bear Instagram post announcing its newest line, Skoosherz, "so now ur making squishmallows?"

³ Josh Coulson, *Build-a-Bear Reveals Its Squishmallow-Like Skoosherz Line*, (Jan. 11, 2024), <https://www.thegamer.com/build-a-bear-squishmallow-like-skoosherz/>.

7. Build-A-Bear's actions have already caused significant harm. For example, customer confusion has and will continue to lead to lost potential customers, sales, and market share.

4 8. This is a straightforward case of trade dress and copyright infringement.
5 Kelly Toys Holdings, LLC owns the popular and distinctive trade dress in
6 Squishmallows and Build-A-Bear is willfully infringing those trade dress rights.
7 Courts regularly find trade dress infringement in similar cases. *See, e.g., Lanard Toys*
8 *Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 714 (9th Cir. 2010) (affirming jury verdict
9 finding trade dress infringement); *MGA Entm't, Inc. v. Multitoy, Inc.*, No. CV04-2524,
10 2005 WL 8156296, at *3-4 (C.D. Cal. Oct. 11, 2005) (finding that defendant infringed
11 plaintiff toy company's trade dress). Kelly Toys Holdings, LLC also owns copyrights
12 to certain Squishmallows and Build-A-Bear is likewise willfully infringing on those
13 copyrights by selling its Skoosherz products that copy constituent elements of those
14 copyrights. Through this action, Kelly Toys seeks monetary and injunctive relief to
15 stop Build-A-Bear's copycat efforts, put an end to consumer confusion, and vindicate
16 the intellectual property rights in Squishmallows.

THE PARTIES

18 9. Plaintiff Kelly Toys Holdings, LLC is a Delaware limited liability
19 company with its principal place of business in Los Angeles, California.

10. Plaintiff Jazwares, LLC is a Delaware limited liability company with its
11 principal place of business in Broward County, Florida.

22 11. Plaintiff Kelly Amusement Holdings, LLC is a Delaware limited liability
23 company with its principal place of business in Syosset, New York.

24 12. Plaintiff Jazplus, LLC is a Delaware limited liability company with its
25 principal place of business in Broward County, Florida.

26 13. Plaintiffs are all affiliated entities, governed by common ownership and
27 intercompany agreements.

1 14. On March 31, 2020, non-party Kellytoy Worldwide, Inc., the previous
2 holder of the copyrights and trade dress rights at issue, assigned all legal title to the
3 distinctive trade dress associated with the Squishmallows products, as well as all
4 registered copyrights in and related to the Squishmallows products, to Plaintiff Kelly
5 Toys Holdings, LLC. Accordingly, Plaintiff Kelly Toys Holdings, LLC is the legal
6 owner of registered copyrights in and related to its Squishmallows products and the
7 Squishmallows trade dress.

8 15. Kelly Toys Holdings, LLC provides the rights to the remaining plaintiffs,
9 Jazwares, LLC, Kelly Amusement Holdings, LLC, and Jazplus, LLC, to sell and
10 distribute the Squishmallows products that incorporate the protected intellectual
11 property rights. Plaintiffs are all related companies that each independently have the
12 ability to inspect and monitor the Squishmallows products and to maintain the
13 products' quality. Each plaintiff thus has a cognizable interest in the infringement at
14 issue.

15 16. Defendant Build-A-Bear is a consumer toy limited liability company
16 organized under the laws of Delaware with its principal place of business at 415 18th
17 Street, Suite 200, St. Louis, Missouri 63103. Build-A-Bear is registered to do business
18 in California, and has over thirty locations in California, including at least eleven of
19 which are in the Central District of California. Build-A-Bear is in the business of
20 manufacturing and selling children's toys, including plush toys.

JURISDICTION AND VENUE

22 17. This action involves the trademark laws of the United States, 15 U.S.C. §
23 1125(a), and, specifically, the statutory and common law of trade dress infringement.
24 This action also involves the copyright laws of the United States, 17 U.S.C. § 101, *et
seq.*

26 18. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338,
27 and 1367, and 15 U.S.C. §§ 1114, 1116, 1117, 1121, and 1125. Specifically, the Court
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has federal question jurisdiction in this case over the claims brought under federal law and supplemental jurisdiction over the claims brought under state law.

19. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and
1400(a).

5 20. This Court has personal jurisdiction over Defendant Build-A-Bear based
6 on its contacts with the forum. Build-A-Bear has purposefully directed its tortious
7 activity at California. Build-A-Bear has over thirty physical locations in California,
8 including at least eleven within the Central District of California, where Build-A-Bear
9 sells its products, including, upon information and belief, the infringing Skoosherz.
10 The infringing Skoosherz are also available for order online via Build-A-Bear's
11 website and pick up at physical locations in California. In order to sell Skoosherz in
12 Build-A-Bear's California branches, the infringing articles were either manufactured
13 in or shipped to California.

14 21. Build-A-Bear knew its actions would cause harm in California. Build-A-
15 Bear is aware of the locations of its physical storefronts and launched its Skoosherz
16 product with the knowledge that it would be sold in its brick-and-mortar locations,
17 including, upon information and belief, in California.

BACKGROUND FACTS

Kelly Toys Launches Its Squishmallows Products

20 22. Kelly Toys is an innovative and highly successful creator, manufacturer,
21 distributor, and seller of unique plush toys, including its Squishmallows line of plush
22 toys under the SQUISHMALLOWS brand.

23 23. In 2016, Kelly Toys conceived of and began creating its Squishmallows
24 line of plush toy designs that share common, unique features distinguishing them from
25 the goods of others. Many of these designs are the subject of United States Copyright
26 Registrations or pending applications therefor, and each is sold in commerce under the
27 Squishmallows brand. In essence, these creative development efforts produced an

1 entirely new class of plush toys that has carved a previously non-existent niche in the
 2 marketplace.



14 24. Kelly Toys Holdings, LLC is the sole owner of all right, title, and interest
 15 in and to the Squishmallows products that possess unique, recognizable and
 16 distinguishing features that are common across much of the Squishmallows line. From
 17 2016 to the present, Kelly Toys has expended large sums of money in developing,
 18 advertising and promoting the Squishmallows Trade Dress (defined below), and the
 19 product designs embodying it, throughout the United States. In fact, Kelly Toys spends
 20 approximately \$1,000,000 annually in direct to consumer and business-to-business
 21 advertising in connection with its Squishmallows products.
 22

Squishmallows Have a Distinctive Trade Dress

23 25. In 2016, designers working at Kellytoy Worldwide conceived of and
 24 began creating a line of plush toys designs that were later released as toys named
 25 Squishmallows. With many stuffed animals and toys already on the market, the
 26 designers sought to create a look distinct to Squishmallows that would provide them
 27 with their own unique look to differentiate them from the many competing products.
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1 26. Therefore, when developing the Squishmallows Trade Dress, the
 2 designers made specific design choices to ensure that the overall visual impression of
 3 Squishmallows was different than the design choices made by the many stuffed
 4 animals and other toys available on the market. The seven original Squishmallows
 5 (pictures included below) released in 2017 make clear that the designers intended for
 6 the original Squishmallows to bear a common, distinctive overall visual impression.



7 27. The overall visual impression of the distinctive Squishmallows Trade
 8 Dress is created through a combination of the individual elements discussed in the
 9 following section. Though some plush toys that existed in the marketplace in 2017
 10 had one or more of the below elements, none included all of them in a single plush toy
 11 to create the same overall visual impression that the Squishmallows Trade Dress
 12 creates.

13 **A. Element 1: “Substantially egg/bell/oval shaped plush toys depicting
 14 various similarly shaped abstract/fanciful renditions of
 15 animals/characters”**

16 28. When designing Squishmallows, the designers observed that the plush
 17 toys on the market that depicted animals or characters were largely shaped as
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1 traditional, full-figure animals, with generally full or proportional head sizes, arms,
2 and legs, such as in the following examples:

3 29. The designers made a deliberate design choice to differentiate the
4 Squishmallows Trade Dress from these designs by creating an abstract or fanciful
5 rendition of animals and characters that deliberately did not use the traditional, full-
6 figure style. The trade dress instead uses an egg/bell/oval shape, rather than a full-
7 figure or shapes like squares, spheroid, and triangles. And even when the
8 Squishmallows have arms or legs, the limbs are not proportional to what a consumer
9 would expect in a toy that is meant to look like a real animal or character.

10 30. This design choice was atypical because consumers at the time preferred
11 purchasing plush toys that looked similar to animals and characters that they were
12 already familiar with. Even knowing that, the Squishmallows designers preferred
13 creating a plush with a nontraditional shape to better differentiate their new products
14 from the marketplace, even if it would initially be harder to appeal to consumers with
15 such a nontraditional look:

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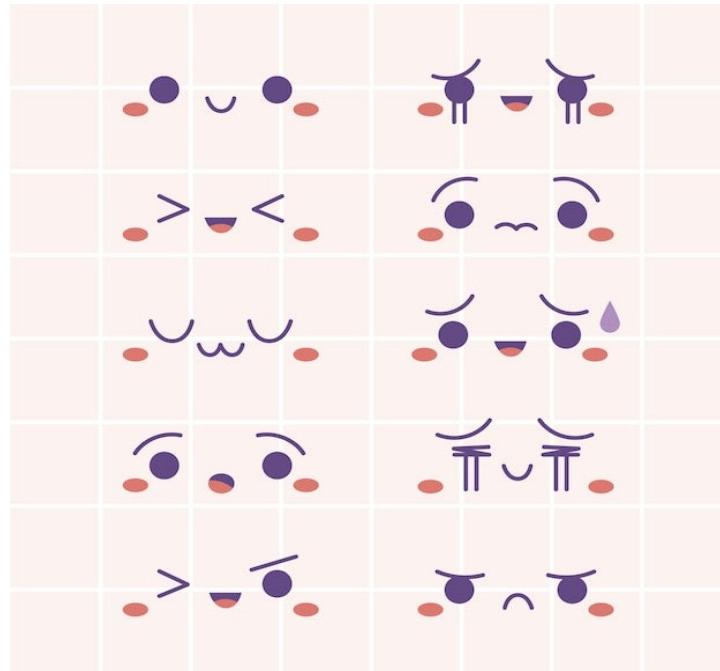
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1	Other Cat Toys	Squishmallows Trade Dress in a Cat
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16	B. Element 2: “simplified Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys”	
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21	31. As another intentional design choice to differentiate Squishmallows, the	
22	designers opted to create faces on Squishmallows that were different from the industry	
23	standard. Since the face of a plush toy is often one of the first things that consumers	
24	see, choosing a nontraditional look for the face further differentiated Squishmallows	
25	from other products available on the market.	
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1 32. The market generally opted to create faces that were similar to what
2 consumers saw in animals in the wild and media, or characters in media. This included
3 faces, eyes, and snouts that look natural and familiar:



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10 33. In contrast, the designers of Squishmallows opted away from a realistic
11 animal and character faces and instead chose to utilize some elements from a different
12 style of design commonly known as “Kawaii.” A Kawaii design disclaims the use of
13 natural faces and instead employs simple features to create a cute, lovable, or innocent
14 look through use of simplified shapes and soft lines. The Kawaii design originated in
15 Asia, but was not a popular choice in American plush toys. As depicted below, for
16 example, Kawaii-style eyes include simple, but cartoon-style, eyes, as opposed to the
17 traditional glass, plastic, or shoe “button eyes”:



1 34. But the designers also deviated from the pure Kawaii design as well.
2 Rather than adopt the popular Kawaii features with cartoonish elements, the designers
3 focused on using simplified shapes and marks with stylized artworks on the body of
4 the Squishmallows. The Squishmallows Trade Dress thus does not adopt a pure
5 Kawaii design, as can be seen in the following toy:



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10 35. In sum, in utilizing elements from the Kawaii design, the designers chose
11 simplified faces for animals and characters that used simple shapes and marks, such as
12 round black eyes, rather than the natural shapes associated with the animals or
13 characters. This design choice made Squishmallows look different than traditional
14 animals or characters and pure Kawaii designs, creating the different visual impression
15 the designers sought to create through the Squishmallows Trade Dress:
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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15	Traditional Faces Squishmallows Trade Dress in a Fox and a Hedgehog
 	 

16 **C. Element 3: “embroidered facial features, such as eyes, nostrils,
17 and/or mouths”**

18 36. In the toy industry, companies can choose to depict facial features like
19 nostrils and mouths in plush toys through printing and sublimation printing. At a high
20 level, printing or sublimation printing involves transferring a digital print to fabric
21 through a process using high heat. The heat helps to ensure that the print, including
22 the colors, will not run or fade, while still ensuring that the physical product displays
23 the features from the digital print. Employing this process often helps companies save
24 costs.

25 37. The designers of the Squishmallows Trade Dress chose to embroider the
26 facial features rather than use printing or sublimation printing. At a high level,
27 embroidering involves physically threading the facial features into the toy through
28 hand or machine.

1 38. The Squishmallows Trade Dress specifically disclaims the use of printing
 2 and sublimation printing for depicting facial features. Embroidering, rather than
 3 printing or sublimation printing, additionally contributes to the different look of the
 4 Squishmallows from other plush toys:

5	Printing	Squishmallows Trade Dress in Owls
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13 **D. Element 4: “distinctive contrasting and non-monochrome coloring”**

14 39. Many companies use either monochrome coloring or complementary
 15 coloring in their plush toys. Monochrome coloring is using one color for the whole
 16 toy. Companies like using monochrome for popular toys like teddy bears because
 17 consumers associate teddy bears with a brown color:



25 40. And even when using multiple colors, companies prefer exclusively using
 26 colors that are complementary for their product lines. Some are complementary
 27 because the colors naturally complement each other, like dark brown and light brown.
 28 Other times, the colors complement each other because consumers associate those

1 colors with one another in the context of, for example, an animal or a character from
 2 popular media. Therefore, many plush toys available on the market exclusively choose
 3 designs with complementary colors to appeal to consumers:

4 41. In contrast, the designers of Squishmallows did not limit Squishmallows



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 11 to exclusively monochromatic colors or traditionally complementary colors. They
 12 instead focused on fun colors, putting aside whether consumers would associate the
 13 colors with the products. By employing a broad range of colors, the Squishmallows
 14 Trade Dress can employ a non-traditional, unique look:

Monochrome/Complementary	Squishmallows Trade Dress in Penguins and a Fox
Two monochromatic or complementary color plush cats are shown side-by-side. On the left is a black fluffy cat. On the right is a grey and white tabby cat.	Three Squishmallows plush toys are shown side-by-side. From left to right: a blue penguin, a pink penguin, and a red fox.

1 **E. Element 5: “short-pile velvety velour-like textured exterior with a
2 light and silky memory foam-like stuffing providing an extremely
3 soft and squeezable marshmallow feel”**

4 42. Companies that manufacture plush toys also need to choose the material
5 for the exterior of the toy and the material to fill the inside of the toy. The choices of
6 the exterior and interior material can contribute to the “look” of the plush toys.

7 43. For the exterior, many companies choose fabrics like Velboa. Velboa is
8 a fabric that is intended to have the feel and look of real faux fur. Since many plush
9 toys are animal-like, having an exterior that mimics real faux fur appeals to consumers
10 who want an animal or character plush toy:



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15 44. For the interior, many companies opt to use fills like regular polyester
16 stuffing in toy animals and characters. Regular polyester is cheaper, but can provide
17 a harder feel and look when used as filling in toys.
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19 45. In contrast, but consistent with the understated, unique, and cute look of
20 Squishmallows, Spanboa is used for the exterior and a silky polyester is used as the
21 fill for the interior. Spanboa is a soft fabric utilizing spandex that can give products a
22 stretchy feel and look. Silky polyester can also contribute to a softer look.
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24 46. These exterior and filling choices together help contribute to the unique
25 look of products with the Squishmallows Trade Dress from other toys on the market:
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47. These elements together create an overall visual impression distinct from other toys in the industry. With this distinctive look—coupled with unique designs, extensive marketing efforts, media coverage, and market penetration—the Squishmallows Trade Dress has acquired distinctiveness in the marketplace when compared to other plush toys. And, aided by Kelly Toys' extensive promotional activities and widespread display of plush toys embodying the Squishmallows Trade Dress directed to the public and as a consequence of Kelly Toys' well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys embodying the trade dress as high-quality goods connected with or offered by Kelly Toys. As a result, that trade dress has valuable goodwill and consumer recognition associated with it and has come to symbolize the exemplary reputation of Kelly Toys.

48. Consistent with that advertising and marketing scope, Kelly Toys sells many Squishmallows that feature the iconic trade dress, and whose overall look, feel and image—in particular but without limitation its shapes, colors, textures and graphics—serve as a distinctive source identifier to the consuming public. As can be seen through the below Squishmallows, though they have differences, they share the

1 elements of the Squishmallows Trade Dress and do not have the elements that the
 2 designers specifically disclaimed and opted away from:



18 49. In addition, the Squishmallows Trade Dress, when viewed as a whole,
 19 presents a non-functional look and feel that is uniquely associated with
 20 Squishmallows. The aesthetic features of the Squishmallows Trade Dress do not have
 21 utilitarian functionality, as evidenced and underscored by the following facts: (1) the
 22 unique combination of the egg/bell/oval-shaped characters, simplified Kawaii face and
 23 repeated egg/bell/oval shapes, embroidered facial features, distinct coloring, and
 24 velvety texture yields no utilitarian advantage over other plush toys; (2) there are
 25 innumerable alternative stylistic plush toy features available to and used by
 26 competitors, including, (i) countless alternative plush toy shapes (e.g. traditional
 27 animal designs as opposed to Squishmallows' whimsical, abstract renditions of

1 animals and characters), (ii) numerous alternative means to depict facial features (e.g.
 2 plastic or bead eyes, features emulating realistic animals, countless different facial
 3 expressions), (iii) a myriad of alternative shell materials (e.g. terrycloth, long pile
 4 plush, velboa, satin), (iv) countless alternative stuffing materials available (e.g. beans,
 5 cotton, hard foam, wool, etc.), and (v) innumerable alternative plush designs and
 6 combinations of features actually used and available in the marketplace; (3) even if
 7 there were some utilitarian advantages of the Squishmallows Trade Dress, Kelly Toys'
 8 advertising does not tout or market those advantages; and (4) the Squishmallows Trade
 9 Dress is not the result from comparatively simple or inexpensive methods of
 10 manufactures vis-à-vis other plush toys.

11 50. Further, Squishmallows Trade Dress, when viewed as a whole, does not
 12 have aesthetic functionality, as protection of the specific combination of these aesthetic
 13 features would not impose a non-reputation-related competitive disadvantage against
 14 competitors. Competitors have successfully used innumerable alternative design
 15 elements and combinations of those elements, and the specific combination of the
 16 Squishmallows Trade Dress features does not serve an aesthetic function wholly
 17 independent of any source identifying function. To the contrary, the Squishmallows
 18 Trade Dress was specifically designed to distinguish – and has succeeded in
 19 distinguishing – the source of products embodying the Squishmallows Trade Dress
 20 from the source of other toys. Thus, any advantage gained from the specific
 21 combination of aesthetic features comprising the Squishmallows Trade Dress is based
 22 on Kelly Toys and Squishmallows' reputation, as the specific combination of aesthetic
 23 features comprising the Squishmallows Trade Dress is highly distinctive and has
 24 become associated in the minds of the consuming public with plush toy products of
 25 the highest quality, originating from a single source – Squishmallows.

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1 **Kelly Toys Holdings, LLC Owns Copyrights in Squishmallows**

2 51. Additionally, Kelly Toys Holdings, LLC is also the owner of registered
 3 copyrights in and related to its Squishmallows products (the “Squishmallows Works”),
 4 including listed those in the below chart:

Deposit Copies of Copyrighted Works	Copyright Number
	VA0002346938
	VA0002096026

19 **Squishmallows Are Distinctive and Popular**

20 52. Kelly Toys and its predecessor have, beginning in 2016 and continuing
 21 without interruption, expended a great deal of time, effort, and money in the promotion
 22 of its Squishmallows line. And due to Kelly Toys’ distinctive designs, robust
 23 marketing efforts, media coverage, and market penetration, the Squishmallows Trade
 24 Dress has acquired distinctiveness in the marketplace when applied to plush toys. As
 25 a further result of Kelly Toys’ extensive promotional activities and widespread display
 26 of its Squishmallows directed to the public and as a result of its fairness and integrity
 27 mentioned above, the relevant consuming public has come to recognize and associate
 28

1 plush toys embodying the Squishmallows Trade Dress as high quality goods connected
 2 with or offered by a single source. The Squishmallows Trade Dress thus embodies
 3 valuable goodwill and consumer recognition associated with it and has come to
 4 symbolize valuable goodwill and reputation.

5 53. In addition to being original and inherently distinctive, the
 6 Squishmallows Trade Dress is also widely recognized by consumers. A simple
 7 Internet search using the Google search engine yields, for example, about 56,200,000
 8 “hits” for the search term “Squishmallows.”

9 54. Beyond marketing and selling Squishmallows through thousands of retail
 10 stores nationwide, Kelly Toys additionally markets and sells its Squishmallows via its
 11 website www.squishmallows.com and on www.jazwares.com/brands/squishmallows,
 12 featuring dozens of copyright-protected photographs of its plush toys and models
 13 holding its Squishmallows.

14 55. Kelly Toys also actively engages in promoting its line of Squishmallows
 15 products through its numerous social media accounts, including on Instagram, TikTok,
 16 Facebook, and Twitter. Indeed, Kelly Toys’ legion of loyal fans of its line of
 17 Squishmallows have been extremely engaged on social media, including TikTok,
 18 Instagram, and Facebook, demonstrating their awareness and affection for Kelly Toys’
 19 Squishmallows. Squishmallows videos have been viewed more than 11 billion times
 20 on TikTok and fans have posted Squishmallows content more than 1 million times on
 21 Instagram.

22 56. Kelly Toys’ Squishmallows have become a phenomenon—they have
 23 turned into a collectors’ item, with their avid fanbase searching high and low to collect
 24 as many of the over 3,000 different Squishmallows characters as possible.

25 57. Indeed, sales of Squishmallows have increased over 300% in 2022 alone,
 26 with sales soaring to over \$200 million worldwide.

27 58. Further adding to their recognition and secondary meaning in the
 28 marketplace, Squishmallows have been featured in over 300 publications, including

1 magazines, press articles, reviews, and videos, including many mainstream media
 2 publications such as the Washington Post, the New York Times, TIME Magazine,
 3 Forbes, The Guardian, the New York Post, the Costco Connections Magazine, People
 4 Magazine, Seventeen Magazine, and many others. By way of example, the
 5 Washington Post characterized Squishmallows as “the hottest toy on the market” and
 6 described its avid fanbase as follows: “The fandom is often likened to the Beanie Baby
 7 craze — and on its way to be an enduring brand like Hello Kitty and Pokémon.”⁴



17 59. The New York Times has proclaimed that “Squishmallows are Taking
 18 Over,”⁵ Forbes named them “2022’s Must-Have Christmas Toy,”⁶ and The Guardian

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22 ⁴ Jaclyn Peiser, *Adults Are Driving Sales of the Hottest Toy on the Market: Squishmallows*, Wash. Post. (June 25, 2023),
 23 <https://www.washingtonpost.com/business/2023/06/24/squishmallows-toy/>.

24

25 ⁵ Taylor Lorenz, *Squishmallows Are Taking Over*, N.Y. Times (March 18, 2021),
<https://www.nytimes.com/2021/03/16/style/squishmallows.html>.

26

27 ⁶ Mark Faithfull, *Squishmallows Going Viral, Warren Buffet and 2022’s Must-Have Christmas Toy*, Forbes (Dec. 13, 2022),
<https://www.forbes.com/sites/markfaithfull/2022/12/13/squishmallows-going-viral-warren-buffett-and-2022s-must-have-christmas-toy/?sh=692f77db22ad>.

1 has recognized the toy's rise in popularity on social media, writing that
2 "Squishmallows go from TikTok sensation to top Christmas toy."⁷

3 60. Squishmallows' widespread popularity is further demonstrated by its
4 recent October 2023 feature on the cover of Costco Connections, the magazine
5 circulated monthly to nearly 15 million Costco members nationwide with
6 advertisements for products sold at Costco, raving that "Squishmallows have taken
7 over the toy world," and that "as toy stores go, the marshmallow-like plush toy's
8 meteoric rise to the top of the \$100 billion global toy market is one for the ages."⁸

9 61. Squishmallows' fandom ranges across all ages, from children to teens to
10 adults. Celebrities like Kim Kardashian and Lady Gaga have identified themselves as
11 avid devotees of the brand, and have published messages and photos of their
12 Squishmallows collections on their social media accounts:

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24 ⁷ Zoe Wood, *Squishmallows Go From TikTok Sensation to Top Christmas Toy*,
25 Guardian (Dec. 9, 2022),
<https://www.theguardian.com/business/2022/dec/09/squishmallows-go-from-tiktok-sensation-to-top-christmas-toy>.

26
27 ⁸ Mark Caldwell, *Soft Sell*, Costco Connection, Oct. 2023, at 22,
https://mobilecontent.costco.com/live/resource/img/static-us-connection-october-23/US_October_Connection_2023.pdf.



20 62. In September of 2022, Squishmallows was awarded the “People’s
 21 Choice” awards by The Toy Foundation, and in both 2022 and 2023 won the coveted
 22 “Toy of the Year” and “Plush Toy of the Year” awards. Squishmallows are so popular
 23 that they have been identified as the most popular toy brand across 41% of the U.S.
 24 states—far ahead of other well-known mega brands like Hot Wheels, Lego, Nintendo
 25 Switch, Nerf, and Play-Doh.

26 63. Due to Squishmallows’ massive success and popularity, consumers
 27 associate the high-quality Squishmallows toys with the Squishmallows Trade Dress.
 28

1 **Build-A-Bear's Infringing Skoosherz Products**

2 64. True to its name, Build-A-Bear is best known for providing a place for
 3 people to create their own customizable toys. Build-A-Bear offers a number of
 4 premade, unstuffed plush animals and characters that consumers can stuff themselves
 5 to build their own toy. Consumers can also customize their plush toy, for example by
 6 buying it clothes and accessories, or purchasing audio recordings to incorporate inside
 7 the toy.

8 65. On January 11, 2024, Build-A-Bear launched "Skoosherz," a line of plush
 9 toys that copies and imitates Squishmallows. The Skoosherz products are a radical
 10 departure from the company's typical products. Indeed, they lack all the customizable
 11 aspects that Build-A-Bear is known for. Consumers cannot go into a Build-A-Bear
 12 Workshop and build their own Skoosherz. Instead, Skoosherz are pre-made and
 13 available for purchase in the same way any traditional manufacturer would sell a toy.

14 66. Instead of maintaining its original idea of allowing consumers to create
 15 their own toys, Build-A-Bear now seeks to trade off the goodwill of Squishmallows
 16 by marketing obvious copycat products—plush toys that look almost identical to
 17 popular Squishmallows. To be clear, Build-A-Bear is not licensed or otherwise
 18 authorized to market or distribute products embodying the copyrighted designs or the
 19 Squishmallows Trade Dress.

20 67. Skoosherz toys have the *same* distinctive trade dress as the popular
 21 Squishmallows, including: substantially egg/bell/oval shaped plush toys depicting
 22 various similarly shaped abstract/fanciful renditions of animals/characters; simplified
 23 Kawaii faces with repeating and complementary rounded/oval shaped graphics
 24 depicting features on the characters themselves (such as eyes, snouts and bellies) and
 25 which conform to and support the overall egg/bell shape of the toys; embroidered
 26 facial features, such as eyes, nostrils, and/or mouths; distinctive contrasting and non-
 27 monochrome coloring; and short-pile velvety velour-like textured exterior with a light
 28 and silky memory foam-like stuffing providing an extremely soft and squeezable

1 marshmallow feel. Side by side comparisons of Squishmallows and copycat
2 Skoosherz products plainly show how striking the similarities are:

3

4 Squishmallows Original Product	Skoosherz Copycat Product
 	 
	

Squishmallows Original Product		Skoosherz Copycat Product
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27		
28		

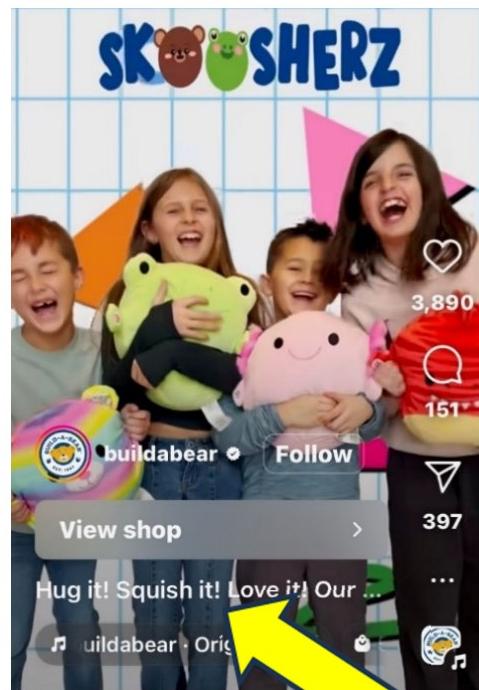
	Squishmallows Original Product	Skoosherz Copycat Product
1	Squishmallows Original Product	Skoosherz Copycat Product
2		
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4		
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9		

68. Not only has Build-A-Bear purposely copied the Squishmallows Trade Dress, it uses one of the *same* suppliers to manufacture Skoosherz that Kelly Toys use to create Squishmallows. Upon information and belief, Build-A-Bear commissioned a Chinese manufacturer that has rights to manufacture Squishmallows to produce the copycat Skoosherz. Upon information and belief, Build-A-Bear received notice and knows that Skoosherz are improper Squishmallows copycats. Yet Build-A-Bear brazenly ignored the warning and produces the toys anyway.

Consumer Confusion

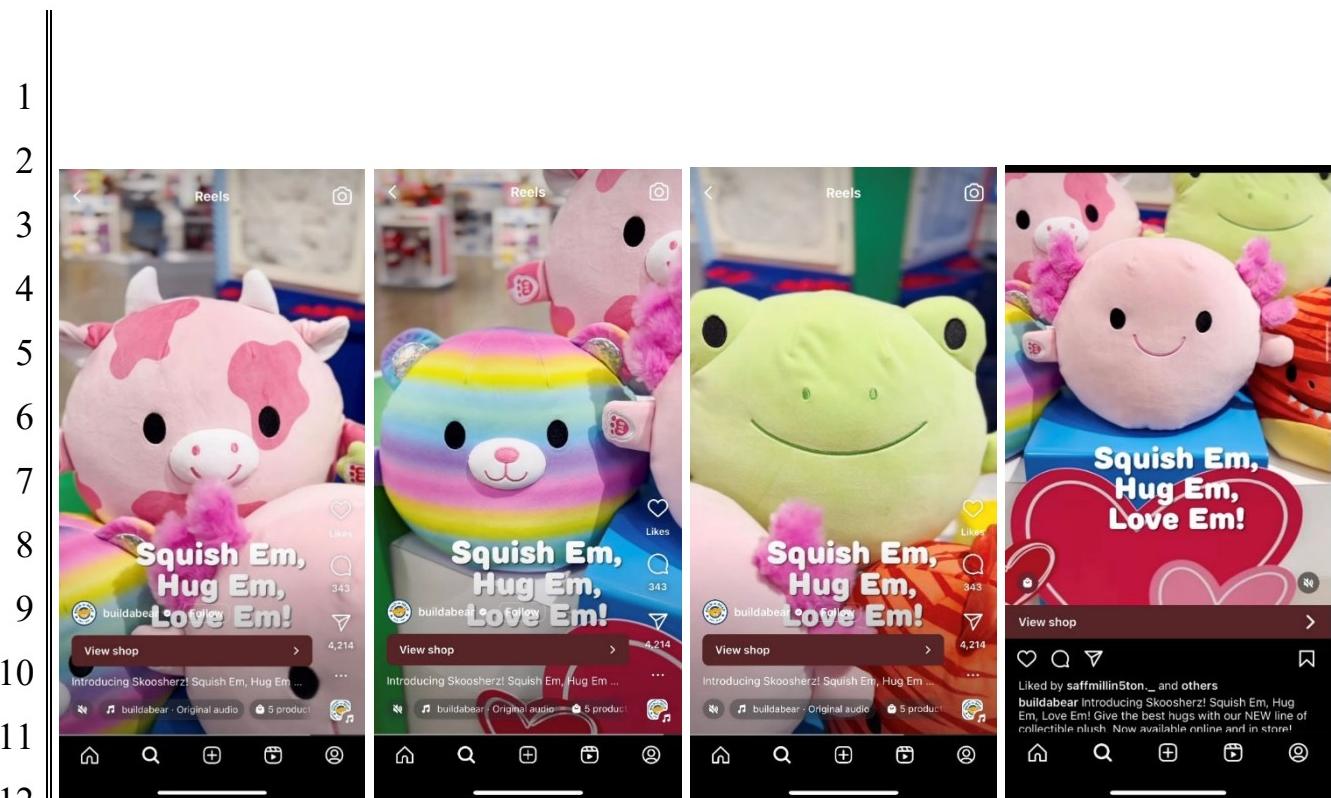
69. Not only do Skoosherz visually and tactiley simulate Squishmallows, but Build-A-Bear has also tried to trick customers looking for Squishmallows into buying Skoosherz instead. By naming its products that so closely resemble Squishmallows “Skoosherz,” Build-A-Bear has taken steps to ensure that customers seeking out Squishmallows (often referred to as “Squish”) become mistaken by the confusingly similarly named Skoosherz instead.

70. Build-A-Bear has sought to market off of this association, portraying its Skoosherz as the “most squishable,” and advertising that consumers can “Squish” them, plainly seeking to create an association between the infringing Skoosherz and the wildly popular Squishmallows, or “Squish.”



Our NEW SKOOSHERZ Are the Most Squishable, Lovable and Huggable Friends!

Shop Now



71. Build-A-Bear's descriptions of individual Skoosherz toys similarly seek to create an association with Squishmallows, noting that they are "squishable." For example, the product details for Build-A-Bear's axolotl state:



Product Details Specifications Gift Options Store Availability

Skoosherz are our most squishable, lovable and huggable friends! Our fan favorite pink axolotl gets the Skoosherz treatment with this adorable plush. The large, round plush has the axolotl's signature smiley face with fuzzy pink gills on its side. Make a splash with this ultra huggable axolotl friend!

1 72. Build-A-Bear also markets its Skoosherz line in a strikingly similar
2 fashion to Squishmallows, as depicted below:

Original Squishmallows



Copycat Skoosherz



73. Skoosherz products create a likelihood of confusion with original
Squishmallows products. In fact, there is evidence of *actual* consumer confusion. For
example, on a recent promotional Skoosherz Instagram post, a user asked whether
Build-A-Bear was now making Squishmallows:

-  **buildabear** • Follow
Original audio
-  **lauryngmarshall** so now ur making squishmallows?
1h Reply

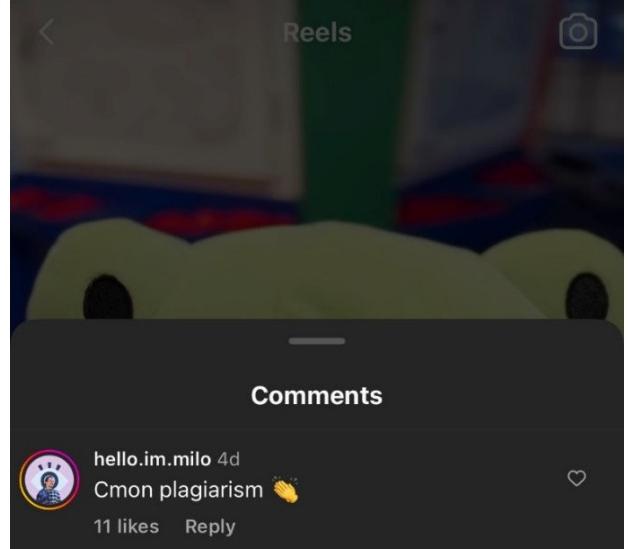
22 74. Other consumers have also noted how similar Skoosherz are to
23 Squishmallows. Indeed, as shown below, the official Build-A-Bear Instagram account
24 was forced to clarify that these were indeed Skoosherz, not Squishmallows, when a
25 commentator posted “SQUISHMALLOW!?!?” to Build-A-Bear’s promotional video
26 of Skoosherz. This led another poster to jokingly direct that the “build a bear social
27 media employee [should] like this comment if ur being held hostage,” jestingly

1 suggesting that the Build-A-Bear Instagram administrator was being forced to clarify
2 that these were “*Skoosherz” and not Squishmallows against their will:



75. These users were not alone. Build-A-Bear’s Instagram post announcing its new Skoosherz line is riddled with posts calling them “knockoff Squishmallows” and noting the obvious similarities between these new products and the well-known Squishmallows:

1
2
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5
6
7 Comments
8
9 ii_emie1245 4d Knockoff squishmallows.... great😊
10 3 likes Reply
11
12
13 Comments
14
15 buildabear • Follow Original audio
16 lauryngmarshall so now ur making squishmallows?
17 1h Reply
18 raech_raech Ripping off Kellytoys
19 3h Reply
20 tolerates_milk I want the frog
21 4h Reply
22 sciencewithdee 🤓
23 6h Reply
24 Jellypaaws I NEEDDDD
25 6h Reply
26
27
28


- 34 -
COMPLAINT

6509778

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BUILDBEAR
Posts

Follow

Hugging is a silent way of saying you matter

Comments

cheezitgremlinhehe 5d

don't get me wrong, i love build-a-bear alot but these are just knock-off squishmallows :/

Reply

62

 **king._crow** 1w
I love build a bear but why
the knock off squishmallows? First Ty did
it not BAB? I know the plush market is competitive but
maybe come up with your own ideas instead of copying
them cuz you're not gonna be able to compete if you
do the same thing

 **breezyeazyspam** 1w
Basically squishmallows ♡

 star.m00nlight.dreamer 6d
How did not Squishmallow not file a lawsuit for this,
Either way it's adorable, if there is Stitch or Hello Kitty I want one!

1 76. Other consumers noted that Skoosherz are “like a worse Squishmallow,”
2 even noting that Skoosherz chose to copy several of the most popular Squishmallows
3 characters. Still others highlight the fact that Skoosherz represent a radical departure
4 from Build-A-Bear’s traditional model of building a custom toy, referring to them as
5 “soulless ripoff[s]”:

 lairviniaa • 10 hr. ago

I'm sorry but I really can't see the appeal 😞 like I collect both squishmallows and bab but these designs are just lazy and look like cheap squishmallow knockoffs (they literally used the most popular squishmallow animals/designs) and like I don't understand why they'd make these (besides wanting an easy cash grab) they have none of the features that make babs special and unique, they didn't even make clothes for them and they're overpriced too (and imo they're not even cute 😞) I mean if you enjoy them I'm happy for you i don't wanna ruin the fun but its just a no from me

 **stabby_coffin_salt** • 2 days ago

It's like a worse Squishmallow. I'd rather just get one of those Squishem's or whatever they're called (they have one that's a plague doctor).

These knockoffs remind me of those TY squish things. Can't stand the lack of quality or thought.

The cow is kinda cute I guess?

 177 Reply Share

 sare dare bear • 4 hr. ago

I feel like if they were going to make something resembling squishmallows they could at least make it so you "build" it and make a line of clothing for it so it does not feel like such a soulless ripoff. It's cute, but Build a Bear has something that is pretty unique and I do not understand why these were released the way they were.

3 Reply Share ...

21 77. Build-A-Bear's actions have caused and will continue to cause significant
22 harm. As a result of consumer confusion, Kelly Toys has lost and will continue to lose
23 potential customers, sales, and market share.

24 78. In sum, Build-A-Bear's willful conduct has damaged and will continue to
25 irreparably damage the reputation, business, and goodwill of Kelly Toys. And, unless
26 enjoined, Build-A-Bear will continue to further escalate its infringing activities.

FIRST CAUSE OF ACTION

(Trade Dress Infringement – 15 U.S.C. § 1125)

3 79. Kelly Toys repeats, realleges, and incorporates each and every
4 allegation made above as if fully set forth herein.

5 80. Kelly Toys Holdings, LLC owns and has a protectable interest in the
6 Squishmallows Trade Dress.

7 81. As owner of all rights, title and interest in and to the Squishmallows Trade
8 Dress, Kelly Toys Holdings, LLC has standing to maintain an action for trade dress
9 infringement under the Lanham Act including, 15 U.S.C. § 1125.

82. The Squishmallows Trade Dress is nonfunctional and highly distinctive
and has become associated in the public mind with plush toy products of the highest
quality and reputation finding their origin in a single source, the Squishmallows brand.

13 83. The Squishmallows Trade Dress has acquired secondary meaning based
14 upon, at least in part, the amount and manner of advertising of products embodying
15 the Squishmallows Trade Dress, the volume of sales, as well as the length and manner
16 of use of the products.

17 84. The Squishmallows Trade Dress is nonfunctional because its distinctive
18 aesthetic features yield no utilitarian advantage, there are innumerable alternative
19 stylistic plush toy features available to competitors, even if there were some utilitarian
20 advantages of the design, Kelly Toys' advertising does not tout or market those
21 advantages, and the Squishmallows Trade Dress is not the result from comparatively
22 simple or inexpensive methods of manufacture. Furthermore, protection of the
23 specific combination of the aesthetic features consistent across Squishmallows brand
24 plush toys would not impose a non-reputation-related competitive disadvantage
25 against competitors, as there are innumerable alternative design elements and
26 combinations of those elements for competitors to utilize. The combination of the
27 Squishmallows Trade Dress features does not serve an aesthetic function wholly
28 independent of any source identifying function; rather, the highly distinctive

1 Squishmallows Trade Dress is intended to distinguish Kelly Toys products from those
 2 of competitors.

3 85. Without Kelly Toys' authorization or consent, and having knowledge of
 4 Kelly Toys Holdings, LLC's prior rights in the Squishmallows Trade Dress, Defendant
 5 has designed, manufactured, distributed, advertised, offered for sale and/or will
 6 continue to design, distribute, advertise, offer for sale, and sell replicas of the
 7 Squishmallows Trade Dress to the consuming public in direct competition with Kelly
 8 Toys, in or affecting interstate commerce.

9 86. Build-A-Bear's infringing designs are, each alone and together,
 10 confusingly similar to the Squishmallows Trade Dress. Defendant's use of the
 11 Squishmallows Trade Dress has caused, and unless enjoined by this Court, will
 12 continue to cause a likelihood of confusion and deception of members of the public
 13 and, additionally, irreparable injury to goodwill and reputation associated with the
 14 Squishmallows Trade Dress.

15 87. Defendant's use of the Squishmallows Trade Dress thus constitutes trade
 16 dress infringement in violation of 15 U.S.C. § 1125(a).

17 88. As a direct and proximate result of Build-A-Bear's unlawful conduct, it
 18 has misappropriated Kelly Toys Holdings, LLC's rights in the Squishmallows Trade
 19 Dress, as well as the goodwill associated therewith, and has diverted sales and profits
 20 from Kelly Toys to Build-A-Bear. Thus, as a direct and proximate result of
 21 Defendant's acts of willful infringement, Kelly Toys has suffered and/or will suffer
 22 irreparable damage to its valuable brand and reputation, and other damages in an
 23 amount to be proven at trial, including Defendant's profits and Kelly Toys' lost profits.

24 89. Defendant's actions described above will cause, have caused, and will
 25 continue to cause irreparable damage to Kelly Toys, unless Defendant is enjoined by
 26 this Court. Kelly Toys has no adequate remedy at law with regard to Defendant's
 27 infringing conduct. Accordingly, Kelly Toys is entitled to a permanent injunction,
 28 pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendant and its agents,

servants, and employees, and all persons acting thereunder, in concert with, or on its behalf, from using Kelly Toys' Squishmallows Trade Dress, or any colorable imitation or variation thereof, in connection with the sale and/or marketing of any products.

4 90. Defendant's aforesaid acts are exceptional within the meaning of 15
5 U.S.C. § 1117.

SECOND CAUSE OF ACTION

(California Common Law Trade Dress Infringement)

8 91. Kelly Toys repeats, realleges, and incorporates each and every allegation
9 made above as if fully set forth herein.

10 92. Kelly Toys Holdings, LLC is the owner of all right, title, and interest in
11 and to the Squishmallows Trade Dress used by Kelly Toys by virtue of its extensive
12 manufacture and sale of products embodying such trade dress as set forth in the
13 preceding paragraphs of the Complaint.

14 93. Kelly Toys' common law trade dress is distinctive, and furthermore, has
15 acquired secondary meaning. Kelly Toys has continuously used its Squishmallows
16 Trade Dress to identify its goods in California and elsewhere, and to distinguish them
17 from goods of a different origin. As such, there are common law rights to the
18 Squishmallows Trade Dress.

19 94. The Squishmallows Trade Dress is nonfunctional and highly distinctive
20 and has become associated in the public mind with plush toy products of the highest
21 quality and reputation finding their origin in a single source, Kelly Toys.

22 95. The Squishmallows Trade Dress has acquired secondary meaning based
23 upon, at least in part, the amount and manner of advertising of products embodying
24 the Squishmallows Trade Dress, the volume of sales, as well as the length and manner
25 of use of the products.

96. The Squishmallows Trade Dress is nonfunctional because its distinctive
aesthetic features yield no utilitarian advantage, there are innumerable alternative
stylistic plush toy features available to competitors, even if there were some utilitarian

1 advantages of the design, Kelly Toys' advertising does not tout or market those
2 advantages, and the Squishmallows Trade Dress is not the result from comparatively
3 simple or inexpensive methods of manufacture. Furthermore, protection of the
4 specific combination of the aesthetic features consistent across Squishmallows
5 products would not impose a non-reputation-related competitive disadvantage against
6 competitors, as there are innumerable alternative design elements and combinations of
7 those elements for competitors to utilize. The combination of the Squishmallows
8 Trade Dress features does not serve an aesthetic function wholly independent of any
9 source identifying function. Rather, the highly distinctive Squishmallows Trade Dress
10 is intended to distinguish Kelly Toys' plush toys from those of competitors.

11 97. The infringing products advertised, distributed, offered for sale, and sold
12 by Defendant incorporate matter constituting replicas and imitations of Kelly Toys'
13 common law trade dress. Such unauthorized use by Defendant of Kelly Toys'
14 common law trade dress constitutes common law trade dress infringement and has
15 already caused, and will likely continue to cause, confusion and mistake in the minds
16 of the trade and the purchasing public as to the source of the products and is causing
17 purchasers to believe such products are authentic products of Kelly Toys when, in fact,
18 they are not.

19 98. Upon information and belief, Defendant has willfully and intentionally
20 misappropriated aspects of Kelly Toys' common law trade dress with the intent of
21 causing confusion, mistake, and deception as to the source of its goods and with the
22 intent to palm off its goods as those of Kelly Toys, and as such, Defendant has
23 committed trade dress infringement under the common law.

24 99. By such actions in infringing Kelly Toys' common law trade dress,
25 Defendant is improperly trading upon the reputation and goodwill, and is impairing
26 valuable rights in, such trade dress.
27
28

100. Upon information and belief, Defendant has committed the above alleged acts in conscious disregard of Kelly Toys' rights, and Kelly Toys is therefore entitled to punitive damages pursuant to the common law of the State of California.

101. Kelly Toys has no adequate remedy at law. The conduct of Defendant has caused and, if not enjoined, will continue to cause, irreparable damage to the rights in and business, reputation, and goodwill of the Squishmallows Trade Dress.

THIRD CAUSE OF ACTION

(Federal Copyright Infringement – 17 U.S.C. § 501(a))

(Kelly Toys Holdings, LLC Only)

102. Kelly Toys Holdings, LLC repeats, realleges, and incorporates each and every allegation made above as if fully set forth herein.

103. Kelly Toys Holdings, LLC is the exclusive owner of the Squishmallows Works.

104. On information and belief, Defendant had actual notice of Kelly Toys Holdings, LLC's exclusive rights in and to the Squishmallows Works.

105. Defendant did not attempt and therefore inherently failed to obtain Kelly Toys Holdings, LLC's consent or authorization to use, manufacture, reproduce, copy, display, prepare derivative works of, distribute, sell, transfer, rent, perform and/or market Kelly Toys Holdings, LLC's Squishmallows Works.

106. Without permission, Defendant knowingly and intentionally reproduced, copied, and displayed the Squishmallows Works by manufacturing, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling infringing products which bear such Squishmallows Works, or artwork that is, at a minimum, substantially similar to the Squishmallows Works. For example:

1	Deposit Copies of Copyrighted Works	Copyright Number	Infringing Build-A-Bear Product
2		VA0002346938	
3		VA0002096026	

16 107. Defendant's unlawful and willful actions as alleged herein constitute
 17 infringement of the Squishmallows Works, including exclusive rights to reproduce,
 18 distribute and/or sell such Squishmallows Works in violation of 17 U.S.C. § 501(a).

19 108. Defendant's knowing and intentional copyright infringement, as alleged
 20 herein, has caused substantial and irreparable harm to Kelly Toys Holdings, LLC in
 21 an amount as yet unknown but to be proven at trial, for which Kelly Toys Holdings,
 22 LLC has no adequate remedy at law, and unless enjoined, Defendant will continue to
 23 cause substantial and irreparable harm to Kelly Toys Holdings, LLC.

24 109. Based on Defendant's wrongful conduct, Kelly Toys Holdings, LLC is
 25 entitled to injunctive relief, Kelly Toys Holdings, LLC's actual damages and lost
 26 profits, and Defendant's profits arising from Defendant's conduct complained of
 27 herein, including any profits that are attributable to the infringement and are not taken
 28 into account in computing the actual damages, in an amount to be proven at trial and

1 enhanced discretionary damages for willful copyright infringement, and reasonable
2 attorneys' fees and costs.

3 **FOURTH CAUSE OF ACTION**

4 **(California Common Law Unfair Competition)**

5 110. Kelly Toys repeats, realleges, and incorporates each and every allegation
6 made above as if fully set forth herein.

7 111. This claim arises under the common law of the State of California relating
8 to unfair competition. This claim is not based on Kelly Toys Holdings, LLC's
9 copyrights.

10 112. Defendant's infringing products incorporate matter constituting
11 reproductions, copies, and/or colorable imitations of Kelly Toys' Squishmallows
12 Trade Dress. Defendant's unauthorized use of Kelly Toys' Squishmallows Trade
13 Dress constitutes unfair competition, and is likely to cause confusion and mistake in
14 the minds of the trade and the purchasing public as to the source of Defendant's
15 products and to cause purchasers to believe that Defendant's products are authentic
16 products of Kelly Toys when in fact, they are not.

17 113. Upon information and belief, Defendant has intentionally appropriated
18 Kelly Toys' Squishmallows Trade Dress with the intent of causing confusion, mistake,
19 and deception as to the source of its goods and with the intent of palming off its goods
20 as those of Kelly Toys. Defendant has thus committed unfair competition under the
21 common law of the State of California.

22 114. By its actions in infringing Kelly Toys' Squishmallows Trade Dress,
23 Defendant is improperly trading upon the reputation and goodwill, and impairing
24 valuable rights in, the Squishmallows Trade Dress.

25 115. Upon information and belief, said activities of Defendant have caused,
26 and if not enjoined, will continue to cause, irreparable harm and damage to the rights
27 in the Squishmallows Trade Dress and to business reputation and goodwill.
28

116. Upon information and belief, Defendant has engaged in the unlawful conduct alleged herein intentionally, maliciously, fraudulently, and oppressively entitling Kelly Toys to punitive damages in an amount to be determined at trial.

FIFTH CAUSE OF ACTION

(California Statutory Unfair Competition –

Cal. Bus. & Prof. Code § 17200, *et seq.*)

117. Kelly Toys repeats, realleges, and incorporates each and every allegation made above as if fully set forth herein.

9 118. By reason of the foregoing, Defendant has been and is engaged in
10 “unlawful, unfair or fraudulent business practices” in violation of Cal. Bus. & Prof.
11 Code § 17200 *et seq.* This claim is not based on Kelly Toys Holdings, LLC’s
12 copyrights.

13 119. The Squishmallows Trade Dress constitutes a protectable property right.
14 Defendant's infringement of the Squishmallows Trade Dress will and has caused an
15 impairment and diminishment of Kelly Toys' rights. Indeed, the activities of
16 Defendant have caused and, if not enjoined, will continue to cause irreparable harm
17 and damage to the rights in the Squishmallows Trade Dress and to business reputation
18 and goodwill. Kelly Toys has no adequate remedy at law for these wrongs and injuries.
19 The damage to Kelly Toys includes harm to its goodwill and reputation in the
20 marketplace that money cannot compensate. Accordingly, Kelly Toys is entitled to a
21 permanent injunction restraining and enjoining Defendant and its agents, servants,
22 employees, and all persons acting thereunder, in concert with, or on its behalf, from
23 using the Squishmallows Trade Dress, or any colorable imitation or variation thereof,
24 in connection with the sale and/or marketing of any products. Kelly Toys is further
25 entitled to recover its costs and attorneys' fees incurred in bringing and prosecuting
26 this action.

PRAYER FOR RELIEF

WHEREFORE, Kelly Toys prays for judgment against Defendant as follows:

a. That Defendant, its officers, members, directors, agents, servants, employees, successors, licensees, representatives, assigns, and all persons acting in concert or participation with them, be permanently enjoined and restrained from:

- (i) Manufacturing, distributing, advertising, offering to sell or selling its infringing products or any colorable imitations of the Squishmallows Trade Dress or the Squishmallows Works;
 - (ii) Using the Squishmallows Trade Dress or any confusingly similar trade dress in connection with plush or other toys;
 - (iii) Using the Squishmallows Trade Dress, or any confusingly similar trade dress, in connection with the advertisement, offer to sell, or sale of any toy products;
 - (iv) Using imitations of the Squishmallows Works in connection with plush toys or other goods;
 - (v) Infringing or contributing to infringement of Kelly Toys Holdings, LLC's copyrights or trade dress, or otherwise engaging in unfair competition with Kelly Toys in any manner or engaging in any conduct tending to falsely represent or likely to confuse, mislead, or deceive suppliers, purchasers, or any member of the public into thinking that Defendant or any of its products are affiliated with Kelly Toys or that Kelly Toys has otherwise sponsored, approved, or licensed any products or services of Defendant;
 - (vi) Engaging in any other activity constituting unfair competition relating to, or constituting infringement of, the Squishmallows Trade Dress or Squishmallows Works; and
 - (vii) Assisting, aiding, or abetting any other person or business entity in engaging or performing any of the activities referred to in

1 subparagraphs (i) through (vi) above, or effecting any assignments or
2 transfers, forming new entities or associations, or utilizing any other
3 device for the purpose of circumventing or otherwise avoiding the
4 prohibitions set forth in subparagraphs (i) through (vi) above.

5 b. That Defendant be directed to file with the Court and serve on Kelly Toys,
6 within thirty (30) days after entry of a final injunction, a report in writing under oath
7 setting forth in detail the manner and form in which Defendant has complied with the
8 injunction;

9 c. That Kelly Toys Holdings, LLC has superior rights to exclusive use in
10 the Squishmallows Works and the Squishmallows Trade Dress in connection with toys
11 vis-à-vis Defendant;

12 d. That the Court direct any third parties providing services to Defendant in
13 connection with any infringing and/or enjoined conduct, including social media
14 platforms (e.g., Instagram, Facebook, Twitter), online marketplaces (e.g., Amazon,
15 Etsy, eBay, Alibaba), online payment providers, including credit card companies (e.g.,
16 PayPal, Visa) and other service providers (e.g., Google, GoDaddy, LiveChat, Shopify)
17 to cease providing services to Defendant in connection with the offer for sale and sale
18 of the infringing products or any other products using, infringing, or embodying the
19 Squishmallows Trade Dress or the Squishmallows Works;

20 e. That Defendant be required to pay Kelly Toys such damages as it has
21 sustained as a consequence of Defendant's infringement of the Squishmallows Trade
22 Dress and the Squishmallows Works and trebling of those damages under 15 U.S.C. §
23 1117;

24 f. That Defendant be required to pay Kelly Toys Holdings, LLC such
25 damages as it has sustained as a consequence of Defendant's infringement of and the
26 Squishmallows Works and trebling of those damages;

27 g. Adjudge that the Defendant, by its unauthorized use of the
28 Squishmallows Trade Dress and Squishmallows Works for plush toys, and other acts

1 as it may have undertaken relating to the Squishmallows Trade Dress and/or
2 Squishmallows Works, in violation of Kelly Toys' rights under 15 U.S.C. § 1125(a),
3 17 U.S.C. § 501(a), under California state law (including, without limitation, Cal. Bus.
4 & Prof. Code § 17200 *et seq.*), and under common law, and that they have done so
5 willfully;

6 h. Direct Defendant to provide an identification in writing of any and all
7 entities that are presently using the Squishmallows Trade Dress or Squishmallows
8 Works on Defendant's behalf and inform them that they must immediately cease such
9 use;

10 i. Direct Defendant to immediately recall any and all merchandise
11 previously provided to any entity embodying or using the Squishmallows Trade Dress
12 or the Squishmallows Works;

13 j. Enter an order, pursuant to 15 U.S.C. § 1118, directing Defendant to
14 deliver for destruction all products, brochures, marketing materials, decals, stickers,
15 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
16 possession or under its control, embodying any unauthorized copy of the
17 Squishmallows Trade Dress or any of the Squishmallows Works, or any simulation,
18 reproduction, counterfeit, copy, confusingly similar likeness, or colorable imitation
19 therefor, and all plates, molds, matrices, programs, and other means of making the
20 same;

21 k. That Defendant provide in writing with the following information relating
22 to Defendant's goods marketed, advertised, offered for sale, or sold under either or
23 both of the Squishmallows Trade Dress and/or Squishmallows Works:

- 24 (i) the name, address, and telephone number of each and every United
25 States entity to whom Defendant has made available or otherwise
26 provided any such products;
27 (ii) the total number of units distributed and sold;
28 (iii) the total number of units remaining in inventory; and

(iv) a full accounting as to the precise dollar amount of such products made available or provided and the profits recognized by Defendant in connection with such actions;

l. Direct Defendant to pay the costs of corrective advertising;

m. Direct Defendant to pay Plaintiffs' attorneys' fees and costs incurred in

6 initiating and prosecuting this action;

n. Direct Defendant to pay punitive damages and exemplary damages
ding to proof;

9 o. That Kelly Toys recover its actual damages, Kelly Toys' lost profits, and
0 Defendant's profits arising from Defendant's conduct complained of herein, including
1 any profits that are attributable to the infringement and are not taken into account in
2 computing the actual damages;

p. That the Court award enhanced and treble damages;

4 q. That Kelly Toys be awarded interest, including pre-judgment interest, on
5 the foregoing sums:

6 r. That the Court direct such other actions as it may deem just and proper to
7 prevent the public from deriving the mistaken impression that and products or services
8 offered, advertised, or promoted by or on behalf of Defendant is authorized by Kelly
9 Toys or related in any way to Kelly Toys' products or services; and

s. For such other and further relief as the Court may deem just and proper.

Dated: March 21, 2024

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DEMAND FOR JURY TRIAL

Kelly Toys hereby demands a trial by jury.

Dated: March 21, 2024

HUESTON HENNIGAN LLP

By: /s/ Moez M. Kaba

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